Matthew W. Wright (014104)
Christopher S. Welker (020060)
WRIGHT WELKER & PAUOLE PLC
10429 South 51st Street, Suite 285
Phoenix, Arizona 85044
(480) 961-0040
mwright@wwpfirm.com
cwelker@wwpfirm.com
Attorneys for Defendant Sierra Vista Unified School District

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

THOMAS ABRUZZO, natural father on behalf of ASHLEY ABRUZZO AND KRISTA ABRUZZO, minors, Plaintiffs, vs. SIERRA VISTA UNIFIED SCHOOL DISTRICT, a political subdivision of the State of Arizona; DAVID F. FALCON and JANE DOE FALCON, husband and wife, Defendants.	Case No. CV201800043 **SIERRA VISTA UNIFIED SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Charles A. Irwin, Division One)

10429 South 51st Street, Suite 285
Phoenix, Arizona 85044
(480) 961-0040

In accordance with Ariz. R. Civ. P. 56, defendant Sierra Vista Unified School District (the "District") moves the Court for summary judgment in its favor on Plaintiffs' claims. Under Ariz. Rev. Stat. § 12.820.05, the District cannot be liable for losses arising from or relating to a felony perpetrated by an employee. Regardless, defendant David Falcon's felonious conduct, which was obviously *not* done in furtherance of the District's business, was outside the course and scope of his employment.

Background

In May of 2017, 13-year-old twins Ashley and Krista Abruzzo were students at Huachuca Mountain Elementary School in Sierra Vista, Arizona.[1] They rode the bus to and from school, and their bus driver was defendant David Falcon.[2] Plaintiffs allege that from approximately May 19 to May 25, Falcon "sexually abused" Ashley and Krista on multiple occasions.[3] Although the bus videos from those dates do not show sexual abuse or molestation, they do show a few instances of Falcon kissing and hugging Ashley.[4] And Ashley reported to police that that Falcon touched her breast on one occasion.[5]

Falcon was convicted of two counts of sexual abuse and sentenced to 2.5 years in prison.[6] He was also ordered to register as a sex offender.[7] Prior to his conviction for sexual abuse, Falcon was not registered as a sex offender, and had no history of sexual abuse, child molestation, or similar conduct.[8]

Discussion

"Summary judgment is appropriate if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Thus, a trial court should grant summary judgment if the facts produced in support of the claim have so little probative value, given the quantum of evidence required,

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[1] Complaint ¶ 11.
[2] *Id.*
[3] *Id.* ¶ 14.
[4] The District's Statement of Facts ("SOF") ¶¶ 4-5.
[5] SOF ¶ 6.
[6] SOF ¶ 7.
[7] *Id.*
[8] SOF ¶¶ 8-9.

that reasonable people could not agree with the conclusion advanced by the proponent of the claim."[9]

1. Under Ariz. Rev. Stat. § 12-820.05(B), the District cannot be liable for losses arising from or attributable to Falcon's felonious conduct.

By statute, "[a] public entity is not liable for losses that arise out of and are directly attributable to an act or omission determined by a court to be a criminal felony by a public employee unless the public entity knew of the public employee's propensity for that action."[10] Public school districts are political subdivisions of the state and, therefore, fall under the definition of "public entity."[11]

This statutory immunity is not limited to vicarious liability. "By its clear and unambiguous language, § 12-820.05 insulates a public entity from liability for loss *caused by* an employee's felony criminal acts."[12] As the Arizona Court of Appeals recently explained, the statute "does not include any language that would limit the types of loss covered by the statute," and "does not include any language that would limit the public entity's immunity based on the type of action or inaction by the entity that contributed to the injury."[13] Accordingly, it precludes not only vicarious-liability claims based on employee felonies, but also direct claims "for negligent hiring and supervision" that "arise out of or are directly attributable to" an employee's felonious acts.[14]

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[9] *Gallagher v. Tucson Unified Sch. Dist.*, 237 Ariz. 254, ¶ 8 (App. 2015) (citations omitted).
[10] Ariz. Rev. Stat. § 12-820.05(B).
[11] Ariz. Rev. Stat. §§ 15-101(23), 12-820(7). *See also Gallagher*, 237 Ariz. at 256-57 (applying § 12-820.05 to a school district).
[12] *Gallagher*, 237 Ariz. at 257, ¶ 10 (emphasis added).
[13] *Id.* ¶¶ 11-12.
[14] *Id.* ¶¶ 12-13.

Here, Plaintiffs are suing the District for injuries that were directly caused by the actions of David Falcon, whom they allege "sexually abuse[d] them on multiple occasions" when he was employed by the District as a bus driver.[15] Sexual abuse is a felony.[16] And although a felony conviction is not a prerequisite for § 12-820.05 to apply,[17] Falcon was convicted of two counts of felony sexual assault, based on the very same conduct for which Plaintiffs are now seeking to hold the District liable in tort.[18] Consequently, Plaintiffs' claims are barred by the plain language of § 12-820.05 unless the District knew that Falcon had a propensity for such conduct.

"[Section] 12-820.05(B) means exactly what it says—that immunity applies unless the public entity ***actually knew*** of the 'employee's propensity for that action.'"[19] There is no evidence whatsoever that the District knew that Falcon had a propensity to sexually abuse children.[20] Nor should the District have known (although that would not matter under the statute). Falcon's background check revealed no history of such conduct, because he had no history of such conduct.[21]

No doubt Plaintiffs will attempt to rely on the exception in the statute for "acts or omissions arising out of the operation or use of a motor vehicle."[22] But the parked school

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[15] Complaint ¶ 14.
[16] *See* Ariz. Rev. Stat. § 13-1404.
[17] *State v. Heinze*, 196 Ariz. 126, 130, ¶ 18 (App. 1999) (interpreting identical language in Ariz. Rev. Stat. § 41-621(K)(1) as not requiring a felony conviction).
[18] SOF ¶ 7.
[19] *Gallagher*, 237 Ariz. at 258, ¶ 15 (emphasis added).
[20] SOF ¶¶ 8-10.
[21] *Id.*
[22] Ariz. Rev. Stat. § 12-820.05(B).

bus was merely the *location* of Falcon's conduct.[23]

There appears to be no Arizona case specifically interpreting the motor-vehicle exception in § 12-820.05. But Arizona courts have construed similar language in insurance policies. For example, in *Mazon v. Farmers Insurance Exchange*,[24] the plaintiff was injured when, while driving his vehicle, a stone thrown from another moving vehicle struck him in the eye, causing loss of sight.[25] His underinsured-motorist insurance covered injuries "arising out of the ownership, maintenance or use of such . . . motor vehicle."[26]

Interpreting this language to mean that "there must be a ***causal relationship or connection*** existing between an accident or injury and the 'ownership, maintenance, or use' of a vehicle," the Arizona Supreme Court found no coverage: "[W]e can find no causal relationship between an injury resulting from a stone thrown by an unknown person from an unidentifiable vehicle, and the ownership, maintenance, or use of that vehicle."[27]

Similarly, in *Love v. Farmers Ins. Group*,[28] the victim was abducted, placed in a vehicle, and beaten to death while his assailants drove him to a remote spot in the desert.[29] Citing *Mazon*, which interpreted the same policy language, the Court of Appeals

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[23] *See Garcia v. Garibay*, No. CIV 12-929 TUC FRZ (LAB), 2013 U.S. Dist. LEXIS 50932, *9 (D. Ariz. Apr. 9, 2013) ("The court does not agree that the location of the sexual conduct removes [Defendant's] acts from the ambit of the immunity statute. . . . The vehicle was simply the situs of the injury."). A copy of this unpublished federal decision is attached for the Court's reference. *See* Rule 32.1, Fed. R. App. Pro. (precluding any court from prohibiting the citation of unpublished federal judicial opinions that are issued on or after January 1, 2007).

[24] 107 Ariz. 601 (1971).

[25] *Id.* at 602.

[26] *Id.*

[27] *Id.* at 603 (emphasis added).

[28] 121 Ariz. 71 (App. 1978).

[29] *Id.* at 73.

recognized: "The majority rule is that there must be a causal relationship between the injury and the ownership, maintenance, or use of the car. . . . Arizona follows this rule."[30] The court held that although the killing took place in the moving car, which was being *used* to dispose of his body, "the victim's death did not result from an accident 'arising out of the ownership, maintenance or use' of the vehicle."[31] The vehicle was simply the *situs* of the injury.[32]

Here, although Plaintiffs' alleged injuries took place inside a parked school bus, the use of the bus did not *cause* their injuries. Falcon's inappropriate touching did, and the bus was simply the *location* where the touching occurred. As other courts have recognized, "no causal connection exists between the operation of a school bus and the injuries suffered by its minor passengers who have been sexually molested by its driver."[33]

This conclusion is further supported by the principle that "[s]tatutes must be given a sensible construction that accomplishes the legislative intent and which avoids absurd results."[34] It is clear that the motor-vehicle exception in § 12-820.05 was intended to ensure

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[30] *Id.* at 74.

[31] *Id.*

[32] *See Garcia*, 2013 U.S. Dist. LEXIS 50932, at *10 ("Similarly here, while the sexual conduct may have taken place in a vehicle, use of the vehicle did not cause [Plaintiff's] injury.").

[33] *See Erie Ins. Exch. v. Claypoole*, 673 A.2d 348, 356 (Pa. Super. 1996). *See also SCR Med. Transp. Servs. v. Browne*, 781 N.E.2d 564, 568 (Ill. App. 2002) (holding that driver's sexual assault of disabled passenger inside vehicle "did not arise out of the use, operation, or maintenance of the vehicle"); *Kramer v. State Farm Fire & Cas. Co.*, 76 Cal. App. 4th 332, 338 (1999) (recognizing and following the "general principle" that "injury, including injury from sexual conduct, does not arise from the 'ownership, maintenance, or use' of a vehicle absent a showing that the use of the vehicle contributed in some way to the injury, beyond merely serving as the situs of the injury").

[34] *Ariz. Health Care Cost Containment Sys. v. Bentley*, 187 Ariz. 229, 233 (App. 1996).

that a public entity is not immune from liability for an auto accident or other injury simply because the employee's negligent operation of a vehicle resulted from a felony DUI or similar conduct. But felony sexual abuse is exactly the type of employee conduct that the legislature intended would *not* give rise to public-entity liability (absent prior knowledge of the employee's propensity for that conduct). And Plaintiffs cannot dispute that the District would be immune had the same conduct occurred in any other setting.

Indeed, it would be nonsensical to hold that a school district is immune from liability for molestation by a teacher in a classroom, but not for molestation by a bus driver in a parked school bus, just because of the fortuity of the location of the molestation. In context, the only sensible construction of the motor-vehicle exception is that the employee's felonious conduct must be unique to, caused by, and necessarily tied to the operation of a motor vehicle. That is not the case here.

Accordingly, the motor-vehicle exception does not apply, and Plaintiffs' claims are barred by § 12-820.05, as they should be. Falcon's surreptitious conduct was solely his fault, not the District's.

2. Falcon's conduct was outside the course and scope of his employment.

"An employer is vicariously liable only for the behavior of an employee who was acting within the course and scope of his employment."[35] An employee acts within the course and scope of employment "if [the conduct] is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and it furthers the employer's

[35] *Pruett v. Pavelin*, 141 Ariz. 195, 205 (App. 1984).

business."[36]

Arizona has yet to apply the scope-of-employment test in the context of a school employee's molestation of a student. But other jurisdictions universally hold, consistent with common sense, that molestation is *outside* the course and scope of employment.[37] Even in California, where "the scope of employment has been interpreted broadly under the respondeat superior doctrine,"[38] a school district is not vicariously liable for molestation by an employee.[39] Among other rationales, the California Supreme Court has explained: "Applying the doctrine of respondeat superior to impose, in effect, strict liability in this context would be far too likely to deter districts from encouraging, or even authorizing, extracurricular and/or one-on-one contacts between teachers and students or to induce districts to impose such rigorous controls on activities of this nature that the educational

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[36] *Baker v. Steward Title & Trust*, 197 Ariz. 535, 540 (App. 2000).

[37] *See, e.g., Bratton v. Calkins*, 879 P.2d 981, 986 (Wash App. 1994) ("A personally motivated sexual relationship between a teacher and a student does not further the employer's interest. The relationship was the result of [employee's] wholly personal motives and was done solely to gratify his personal objectives and desires. Even if his employment provided the opportunity for the wrongful acts, his intentional tortious acts should not be attributable to the school district."); *Mary KK v. Jack LL*, 203 A.D.2d 840 (N.Y. S. Ct. 1994) ("Although these acts occurred on school property during school hours, they were clearly outside the scope of the teacher's employment as they were wholly personal in nature and certainly not done in furtherance of the District's business."); *Boykin v. District of Columbia*, 484 A.2d 560, 562 (D.C. App. 1984) ("[The] assault was in no degree committed to serve the school's interest, but rather appears to have been done solely for the accomplishment of [the employee's] independent, malicious, mischievous, and selfish purposes."). *See also* 31 Am. Jur. Proof of Facts 3d 261 § 7 (2008) ("In all cases examined to date, courts have declined to impose vicarious liability upon a school district under the doctrine of respondeat superior for the criminal conduct of a teacher in sexually molesting a student.").

[38] *Farmers Ins. Grp. v. Cnty. of Santa Clara*, 906 P.2d 440, 448 (Cal. 1995).

[39] *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 956 (Cal. 1989).

process would be negatively affected."[40]

Regardless, the Arizona Supreme Court has declared: ***"[T]o be within the course and scope the act must be, at least in part motivated by a purpose to serve the master rather than solely to serve personal motives unconnected to the master's business."***[41] ***"Conduct done with no intention to perform it as part of a service for which the servant is employed is ordinarily outside the scope."***[42]

Falcon was obviously *not* employed to sexually abuse students. And his conduct was not at all motivated by a purpose to serve the District. Instead, he acted to gratify his own personal desires, which had nothing to do with the District's business. His selfish, felonious conduct was outside the course and scope of employment, and the District cannot be vicariously liable as a matter of law.

Conclusion

Under Ariz. Rev. Stat. § 12-820.05(B), the District cannot be liable for injuries arising from the felony sexual abuse perpetrated by defendant David Falcon. Further, the District is not vicariously liable for Falcon's conduct, which was clearly outside the course and scope of his employment. Accordingly, the Court should grant summary judgment in the District's favor.

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[40] *Id.*

[41] *State v. Schallock*, 189 Ariz. 250, 258 (1997) (emphasis added).

[42] *Id.* at 259 (emphasis added).

DATED this 9th day of October, 2018.

WRIGHT WELKER & PAUOLE PLC

By _____
Matthew W. Wright
Christopher S. Welker
10429 South 51st Street, Suite 285
Phoenix, Arizona 85044
Attorneys for Defendant
Sierra Vista Unified School District

ORIGINAL of the foregoing mailed for filing via Federal Express this 9th day of October, 2018, to:

Clerk of the Court
Cochise County Superior Court
100 Colonia de Salud, Suite 202
Sierra Vista, Arizona 85635

COPY of the foregoing mailed via Federal Express this 9th day of October, 2018, to:

Hon. Charles A. Irwin
Cochise County Superior Court
Division One
100 Colonia de Salud
Sierra Vista, Arizona 85635

COPY of the foregoing mailed this 9th day of October, 2018, to:

Dev K. Sethi
Matthew F. Schmidt
Schmidt, Sethi & Akmajian
1790 E. River Road, Suite 300
Tucson, Arizona 85718
Attorneys for Plaintiffs

/s/Debi Handrahan
6927-1347/1348